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Electronic media transmit instructional material that is protected by copyright law. Under the present Copyright Act (U.S. Code, Title 17, 1909) teachers may use material in the "public domain," and excerpts from copyrighted works under the judicial doctrine of "fair use." Inter-institutional transmission of live performances of complete literary, musical, and graphic works (but not drama or film) may be made without proprietory clearance. Legal experts differ on the right to record for later television transmission those programs which contain complete, copyrighted works. The "not-for-profit" exemption under which education has used copyrighted materials is eliminated in the proposed 1965 revisions before Congress (HR. 4347 and S. 1006). These Bills provide for extended use of copyrighted works in the classroom in all categories except drama; but award no exemption to the recording of complete works in an educational program. An "ad hoc Committee on Copyright Revision," representing a number of educational organizations, recommended amendments to Congress that recognize educational uses and permit the telecast of instructional problems to receivers other than those in a classroom. Ordinary copyright principles apply to duplication and distribution of supplementary instructional materials from copyrighted sources. (TI)

Use of Copyrighted Materials for Instruction Through Inter-Institutional Distribution by Television

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Use of Copyrighted Material for Instruction through Inter-Institutional Distribution by Television

Introduction

This memorandum attempts to answer a number of questions concerning the legal use of instructional materials in educational programs which are prepared for inter-institutional use either by closed circuit or broadcast transmission. Such use may include "live" transmission, recording or taping of programs for later transmission, and exchange of programs between institutions.

Education is concerned primarily with the development and transmission of ideas and information. These objectives can be performed in the intimate relationship between teacher and student, in the classroom with a group of students, or by more modern methods such as the use of the electronic media which can transmit instructional programs to students assembled in a classroom or lecture hall or to the public at large.

Our society, and especially our educational structure, is based on the concept that both ideas and information are free and available for general use without restrictions either legal or otherwise. Under our legal system there can be no monopoly or proprietorship in ideas and information. An exception may take place where an idea can be embodied in a specific format and then patented under federal law. But ideas and information are not protected by copyright law.

What is protected by copyright is the format into which ideas and information may be cast. The owner of the format has therefore an ownership which he can protect through the law.

Not all formats or presentation of ideas and information are protected from use by others by law. Much of the instructional materials which might be used are in the "public domain" and available for any use whatsoever. Materials which have been published and which have never been copyrighted and carry no notice of copyright may be used in any way by anyone, including teachers who prepare classroom lectures or produce taped or recorded programs for television broadcast.

Materials which are protected from use without the owner's consent include (a) unpublished materials, and (b) published materials which have been copyrighted under the federal copyright act.

Unpublished materials are those which have never been duplicated or otherwise made available for public consumption. A teacher who has access to a private letter may appropriate the information and ideas in the letter but may not duplicate and distribute the letter without the owner's consent. No special formalities of copyright are necessary to protect the owner's rights.

However, when materials are "published," i.e., duplicated and offered to the general public, the owner must proceed to have the work "copyrighted" under the federal act. The principal formality is to mark the work "copyrighted" so as to give notice to the public that it may not be used without the owner's consent. After publication, a copyrighted work is protected for a period of 28 years, after which the copyright may be renewed for another 28 years. After 56 years, <u>all</u> works are in the public domain.

In summary, teachers may use any materials in the public domain. They may extract ideas and information from both published and unpublished works,

but they may not make "copies" of either unpublished works or of copyrighted published works.

The Copyright Act, however, does permit some limited uses of copyrighted materials. This use may vary according to the purpose of the use, the nature of the materials which are used, and the amount of "copying."

Part I of this memorandum will discuss these uses of copyrighted materials as they apply specifically to electronic transmission and broadcast of instructional programs for inter-institutional use under the present copyright law.

Unfortunately we are at present in a transitional period as regards the specific provisions of the copyright law. The present Act was passed by Congress in 1909. Several attempts have been made in the past to enact complete revisions of this Act, but all failed. However, in the past five years the Copyright Office has been conducting studies of the problems of copyright looking toward a complete revision. In 1965, identical Bills (H.R. 4347 and S. 1006) were introduced in both houses of Congress and hearings have been conducted on these Bills. Part II of this memorandum discusses the problems of educational uses of copyrighted materials as they are affected by the revisions in these Bills.

Educational organizations have been active in attempting to expand educational uses of copyrighted materials and formed an "ad hoc committee on copyright revision" to advance these interests. This committee has proposed a number of amendments to the proposed Bills and their effects on the subject of this memorandum are discussed in Part III.

Part IV discusses the use of copyrighted materials in supplementary printed or duplicated teaching aids which might be used in connection with broadcast educational programs.

This paper does not discuss the problem of the legal ownership of the instructional program produced by the educational institution. It is assumed that this subject will be discussed in Paper 3, Faculty Rights, Responsibilities, and Concerns as they relate to the Intra- and Inter-Institutional Use of Television Materials.

I. Educational Uses under the Present Copyright Law

A. Use of Excerpts from Copyrighted Works

The present Copyright Act (U.S. Code, Title 17) does not provide for any special uses of copyrighted material for educational purposes. However, many educational uses, including broadcasting, are permitted under various classifications provided for in the Act.

First, a distinction must be made between use of excerpts from copyrighted works and the use of complete works. It is impossible to define precisely what is an "excerpt." It is certainly less than the whole work, so that a map or chart or picture which can be copyrighted individually is not an excerpt even though it may come from a composite work. A complete chapter from a twenty-chapter book would not be an excerpt. The chorus from a song would also not be an excerpt.

On the other hand several stanzas from a ten-stanza poem would be an excerpt. Two or three pages from a chapter in a text book would also be an excerpt. A short scene from a three-act play would be an excerpt. A useful

rule of thumb would be that if the part of the copyrighted material which is used for educational purposes is small enough not to lessen the return which the copyright proprietor might expect from the sale of the complete work, the part is an excerpt.

Education can make any use whatsoever if the used item is an "excerpt." Such uses would include making any number of duplicated copies, use of the excerpt in either a live or taped television performance, or any type of recording.

In short, a teacher may make any use whatsoever of an excerpt from a copyrighted work so long as the material used is only an excerpt. Such use is made legal by the doctrine of "fair use" as interpreted by the courts.

B. Uses of Complete Copyrighted Works

Educational uses of complete copyrighted works is a much more complex subject. Some types of complete works may be used under specified circumstances. A complete work would include a novel, a poem, a piece of music, a picture, a map or a graph, or an article from an encyclopedia.

It is a common practice for publishers to re-issue a work in which the copyright has expired with a current copyright notice. This current copyright, however, does not protect the original work but only the new material added in the form of preface, notes, et cetera.

In order to determine when complete copyrighted works may be used for educational purposes, it is necessary to make a number of distinctions and classifications. First a distinction must be made between a "live" presentation and a "recorded" or taped performance. "Live" performances for television transmission may be made of a number of different types of

copyrighted works; a recorded performance for later reuse may be made of a more limited category of protected materials.

It should be noted that the present Copyright Act makes no distinction between materials which are broadcast and those which are used solely on closed circuit. However, the proposed Bill in Congress provides for such a distinction which is discussed in Part II of this memorandum.

1. Live presentations of complete works

Educational television (either broadcast or closed circuit) may utilize some specific categories of complete works without clearance or permission from the copyright proprietor. For the purposes of this section, copyrighted materials must be sub-divided into the following categories:

a) copyrighted literary materials
b) copyrighted music
c) copyrighted dramas and musical dramas
d) copyrighted photographs, maps, and charts
e) copyrighted films and film strips
f) phonorecords (sound recordings)

Under the present law, live television or radio performances may be made of complete (a) literary and (b) musical works. This use is provided for in Sec. 1 (c) and (e) of the Act which permits performance of both literary and musical works when such performance is "not-for-profit." It is assumed that most if not all educational uses of literary and musical works is "not-for-profit."

Under this exemption in the present law, a university professor may read a complete novel on radio and television. A university orchestra may perform any musical work in the same manner.

However, this same permitted performance does not extend to (c) dramas or musical dramas. Here the educational institution must obtain permission

from the copyright owner in order to perform the work either on broadcast or closed circuit television. The not-for-profit exemption does not apply to plays, operas, operettas, or other types of musical dramas.

The problem of the use of copyrighted (d) graphics, which includes photographs, maps and charts, is more complex. The present Copyright Act does not provide for not-for-profit uses of graphic materials. However, neither does the Act prohibit the "live performance" of such materials. Pictures, graphs, maps and charts may be used as live presentations in a course lecture without special clearance. (Note: The situation is much different where the lecture is recorded, as will be discussed below.)

The problem of the use of copyrighted (e) film strips and films (either with or without sound) is even more complex.

A copyrighted film or film strip (with or without sound track) may not be used on educational television without the permission of the copyright owner. Most films are made in a limited number of copies where the rights of performance are retained by the owner and the copies rented or leased for specific types of uses. It is possible for an educational institution to rent or lease these films for inter-institutional transmission and use.

The present copyright law does not grant any exclusive rights to the producer or performer of a (f) phonorecord (sound recording). The original copyright holder of the material appearing on the record retains all rights of duplication and performance.

In summary, inter-institutional transmission of live performances of complete literary, musical, and graphic works may be made without clearance from the copyright proprietors. Live use of complete dramas, musical dramas, and films may not be made without permission from the copyright owners.

2. Recorded presentations of complete works for later re-use

Much of the economy of intra- and inter-institutional use of televised instruction derives from the fact that such programs can be recorded and re-used for later groups of students. The right to make recordings of those educational programs which include only excerpts from copyrighted works as defined above is unquestioned. This is part of the doctrine of "fair use."

However, the right of an educational institution to record complete works is far from clear under the present Copyright Act. (Note: The right to record such programs under the proposed new Copyright Act is discussed in Part II.)

Legal experts differ on the right to record. It is my considered opinion that under the present Act an educational institution may record for later television transmission either broadcast or closed circuit those educational programs which contain complete literary or musical works. It may not record complete dramas, musical dramas, graphics, films or film strips without the permission of the copyright proprietor. Some lawyers, particularly those whose clients are copyright owners, disagree with this position. The statute is not clear and there are no court cases. My best judgment is that stated above.

II. Educational Uses of Copyrighted Materials under the Proposed Copyright Bill before Congress

The Copyright Office and sub-committees of both houses of Congress have been studying the problems of copyright looking toward a complete revision of the present law. Identical bills have been submitted in both

houses (H.R. 4347 and S. 1006). They provide for significant revisions of the present Act, especially as they affect educational uses of copyrighted materials.

The proposed revisions generally enlarge the rights of the copyright proprietor and to that extent curtail educational uses. The "not-for-profit" exemption under which education has utilized copyrighted materials is eliminated in the present draft. The term of protection is extended from a maximum of 56 years to the life of the author plus 50 years, thus postponing the time when a work enters the public domain.

The best information at this time (October 1966) is that enactment of the new copyright law will not take place until late 1967 or early 1968.

The proposed legislation, if enacted as drafted, will have significant effects on intra- and inter-institutional transmission of educational programs.

A. Use of excerpts under proposed revision

No change is proposed in the educational and other uses of excerpts from copyrighted works. However, the judicial doctrine of "fair use" is to be given Congressional sanction by the inclusion of a section specifically recognizing this doctrine.

B. Use of complete works

The 1965 Bills provide for the extended use of copyrighted materials in a classroom, or as the draft Bill states use "of a work by instructors or pupils in the course of face-to-face teaching in a classroom" (Sec. 109(1)). All types of copyrighted materials may be used "live" in the classroom.

However, several restrictions are placed on the use of copyrighted materials which are broadcast and/or recorded.

In any type of live transmission use may be made of complete copyrighted works except dramas and musical dramas in the course of instruction. The transmission must be made "primarily for reception in classrooms or similar places normally devoted to instruction and is a regular part of the systematic instructional activities of a nonprofit educational institution." (Sec. 109 (2)).

It would appear that educational programs prepared for either inter- or intra-institutional use and transmitted either by broadcast or closed circuit and directed primarily to classrooms under the proposed Bill may utilize complete copyrighted works of all categories except dramatic works.

C. Phonorecords (sound recordings)

Under the existing copyright law, phonorecords or sound recordings of music, literary works or other sounds are not copyrightable. The original copyright owner of the literary or musical work controls the right to record.

However, under the proposed copyright revision, the maker or manufacturer of a sound recording may copyright his presentation and prohibit others from reproducing it.

Under the terms of the Bill, a phonorecord can be played in a classroom and also on an educational broadcast which is primarily instructional. One recording of the phonorecord can be made for delayed broadcast.

D. Recordings

It is in the area of recording programs containing copyrighted materials that the proposed Bills are most restrictive. It is assumed that the doctrine of "fair use" would permit the recording of excerpts from copyrighted

works in that same way that they are now permitted under the present copyright law.

The recording of complete works in an educational program, including literary works, music, and graphics, is given no special preference in the new Bills.

Section 110 of the draft Bills gives both educational and commercial interests the same right to record. The section reads as follows:

"...it is not an infringement of copyright for an organization lawfully entitled to transmit a performance or exhibition of a copyrighted work to the public to make no more than one copy or phonorecord of the work solely for the purposes of the organization's own lawful transmission or for archival preservation, if the copy or phonorecord is not used for transmission after six months from the date it was first made, and is thereafter destroyed or preserved for archival purposes only."

This section would mean that an educational institution which prepared an instructional program could make only one tape recording and this recording could not be used in either broadcast or closed circuit after six months. It would mean that recordings of the program containing copyrighted materials could not be exchanged with other educational institutions without getting clearance from the copyright owners.

III. Educational Uses of Copyrighted Materials Under Proposed Amendments to the Copyright Bill

Shortly after the announcement that a revision of the Copyright Act would be submitted to Congress, a number of educational organizations and associations formed an "ad hoc Committee on Copyright Revision." Among the

organizations represented on this committee are the American Council on Education, the National Education Association, the Modern Language Association, the National Council of Teachers of English, and the National Association of Educational Broadcasting.

This committee has recommended a number of amendments to the proposed Copyright Bill and has testified in support of these changes before the subcommittees of the House and the Senate. In addition a number of conferences have been held with the staff of the Copyright Office in an attempt to find some compromise solutions to the problems which the Bill poses for education.

The following are the proposed amendments to H.R. 4347:

A. Fair Use. The ad hoc committee recommends that the legislative statement of "fair use" in the Bill specifically include mention of educational uses. The following is suggested:

> Sec. 107. Notwithstanding the provisions of Section 106, the fair use of a copyrighted work including its reproduction in copies and phonorecords, or otherwise, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include, among others:
>
> (a) the purpose and character of the use;
> (b) the nature of the copyrighted work;
> (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
> (d) the effect of the use upon the potential market for or value of the copyrighted work.

B. Transmission to classrooms. The ad hoc committee has recommended that the draft Bill be amended to permit the televising of instructional problems to receivers other than those in a classroom. The Copyright Office has apparently agreed to such an amendment.

C. Recordings. The ad hoc committee has recommended that the producer of a recording of an educational program be allowed to make two (instead of one) copies and that these copies be available for use for a period of five years. Educational broadcasters are asking for five to ten copies of each program.

Whether these suggested changes in the proposed Bill will be enacted into law will not be known until Congress has acted on the entire problem of copyright revision.

IV. Duplication and Distribution of Supplementary Instructional Materials from Copyrighted Sources

It is common practice to supply students in regular televised courses of instruction (either broadcast or closed circuit) with printed or duplicated instructional materials for outside study or reading. Much of this material is ordinarily prepared by the instructor to meet the specific needs of the course.

The ordinary copyright principles apply to the production and distribution of this supplementary material. The instructor may use excerpts from literary works without any further clearance from the copyright owners. He may not include copies of complete works without the proprietor's consent. Complete works would include such short works as an entire poem, a short story, an article from a copyrighted magazine or newspaper, a map, chart or picture.

The same restrictions apply to the production of supplementary material as would apply to the production of a regular textbook.

V. Summary

Summary of instructional uses of both copyrighted excerpts and complete works on inter- or intra-institutional television under existing copyright law

	Live broadcast or Closed circuit	Recorded
Copyrighted literary matter	Yes	Yes
Copyrighted music	Yes	Yes
Copyrighted drama	No	No
Copyrighted graphics	Yes	No
Copyrighted films	No	No

Instructional uses under proposed legislation

Copyrighted literary matter	Yes	1 copy for 6 months
Copyrighted music	Yes	Ditto
Copyrighted drama	No	No
Copyrighted graphics	Yes	1 copy for 6 months
Copyrighted films	No	No
Copyrighted phonorecords except of dramas	Yes	1 copy for 6 months